

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)
)
Optical Telecommunications, Inc.)
)
Certification to Operate an)
Open Video System)
)

MEMORANDUM OPINION AND ORDER

Adopted: August 19, 2005

Released: August 22, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On August 8, 2005, Optical Telecommunications, Inc. ("Optical") filed an application for certification to operate an open video system pursuant to Section 653(a)(1) of the Communications Act of 1934 ("Communications Act") and the Commission's rules.¹ Optical seeks to operate an open video system in Miami-Dade County, Florida (the "Service Area").² In accordance with our procedures,³ the Commission posted the application on the Internet.⁴ Miami-Dade County ("the County") filed comments.⁵

2. Pursuant to Section 653(a)(1) of the Communications Act, any entity meeting the requirements may obtain certification to operate an open video system.⁶ In light of the brief period (ten days) for Commission review of certification filings, the Commission concluded that Congress intended

¹ 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1502.

² The Service Area for which Optical seeks certification in Florida are the communities of Mandarin Lakes and Summerville.

³ See *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order*, 11 FCC Rcd 18223, 18247 (1996) ("*Second Report and Order*").

⁴ The Optical application is available via the Internet at <http://www.fcc.gov/mb/ovs/csovsccer.html>. Because of a delay in the delivery of the Commission's mail, the Media Bureau did not receive Optical's application until August 17, 2005. We note, however, that the designated telecommunications official for the service area was served on August 6, 2005 a copy of Optical's application and informed how to timely oppose or comment on the application.

⁵ Because the County was served and has had an opportunity to file comments, it is not prejudiced by our omitting published notice of receipt of Optical's application.

⁶ See 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1501. An operator of a cable system however, generally may not obtain such certification within its service area unless it is subject to "effective competition" as defined in Section 623(1)(l) of the Communications Act, 47 U.S.C. § 543(1)(l). The effective competition requirement does not apply to a local exchange carrier that is also a cable operator that seeks open video system certification within its cable service area.

there to be a streamlined certification process.⁷ Open video system operators may apply for certification at any point prior to the commencement of service. Open video system operators must obtain certification prior to the commencement of service, allowing sufficient time to comply with the Commission's requirements regarding notifications that applicants must provide to potential programming providers.⁸

3. As part of the certification process, the applicant must acknowledge and accept the obligations associated with operation of an open video system and must provide certain information regarding its proposed system.⁹ To obtain certification, an applicant must file FCC Form 1275, which requires, among other things: (a) a statement of ownership, including a list of all affiliated entities;¹⁰ (b) a representation that the applicant will comply with the Commission's regulations under Section 653(b) of the Communications Act;¹¹ (c) a list of the names of the communities the applicant intends to serve; (d) a statement of the anticipated type and amount of capacity that the system will provide; and (e) a statement as to whether the applicant is a cable operator applying for certification within its cable franchise area.

II. DISCUSSION

4. Miami-Dade County asserts that granting an OVS certification to Optical would circumvent the County's ability to administer local consumer complaints and conduct onsite inspections to resolve issues of local importance.¹² It states that the requested certification would eliminate the ability to conduct regular proactive checks and would remove any remedy that consumers have when Optical is not responsive.¹³ The County also argues that cable operators have applied for local cable franchises and failing to require Optical to do the same would create regulation that is less burdensome and more favorable towards the OVS industry.¹⁴ Additionally, the County states that Optical's certification request should be denied or at a minimum an extension of time is requested to evaluate the effect Optical's

⁷ *Second Report and Order*, 11 FCC Rcd at 18243.

⁸ *Id.* at 18247; 47 C.F.R. § 76.1502(a). *See also Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Order on Remand, 14 FCC Rcd 19700, 19705 (1999)(deleting the pre-construction certification requirement from Section 76.1502(a) of our rules).

⁹ *Second Report and Order*, 11 FCC Rcd at 18245-46.

¹⁰ For purposes of determining whether a party is an affiliate, we have adopted the definitions contained in the notes to Section 76.501 of our rules, 47 C.F.R. § 76.501, with certain modifications. 47 C.F.R. § 76.1500(g). Generally, we will consider an entity to be an open video system operator's "affiliate" if the open video system operator holds 5% or more of the entity's stock, whether voting or non-voting. *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Third Report and Order and Second Order on Reconsideration*, 11 FCC Rcd 20227, 20235 (1996) ("*Third Report and Order*"); 47 C.F.R. § 76.1500(g).

¹¹ 47 U.S.C. § 573(b). This provision sets forth the Commission's requirements regarding non-discriminatory carriage; just and reasonable rates, terms and conditions; a one-third capacity limit on the amount of activated channel capacity on which an open video system operator may distribute programming when demand for carriage exceeds system capacity; channel sharing; sports exclusivity, network non-duplication and syndicated exclusivity; and non-discriminatory treatment in presenting information to subscribers. *See also* 47 C.F.R. § 76.1502(a).

¹² Comments at 1.

¹³ *Id.*

¹⁴ *Id.*

certification will have on local consumers.¹⁵

5. Optical has submitted an application on FCC Form 1275 for certification to operate an open video system in the Service Area. We have reviewed the information contained in Optical's application. As required by Form 1275, the Optical application provides the following: company information and a separate statement of ownership listing affiliated entities; eligibility and compliance representations; and system information and verification statements. Optical also confirmed that it served its application upon the designated telecommunications official in the community involved.

6. The ten day statutorily mandated review period for open video system certification applications requires us to confine our review to issues concerning Optical's FCC Form 1275 and its related attachments.¹⁶ The purpose of the open video system certification process is to determine whether Optical's application complies with Congress' mandate and our regulations.¹⁷ By submitting a completed Form 1275, Optical has certified that it will comply with all of the Commission's rules for open video systems. The comment received relates to the County's concern that it will be unable to carefully monitor and review Optical's performance and operations to ensure that an acceptable quality of service is maintained in the communities. In addition, the County's comments suggest that it would favor requiring Optical to have a franchise in order to provide open video service in the Service Area. These concerns relate to matters beyond the adequacy and accuracy of Optical's application. As discussed, Optical has demonstrated that its application is sufficient. With regard to the process of obtaining local franchising authority, however, we note that in the *Order on Remand* of the Fifth Circuit's decision in *City of Dallas, Texas v. FCC*, the Commission stated that the Fifth Circuit determined that localities retain existing franchising authority, but that localities need not exercise this authority through the imposition of open video system franchises.¹⁸ In addition, the Commission states that the decision of whether to impose a franchise on an open video system operator is committed to the discretion of the locality.¹⁹

7. We find that Optical has provided the requisite facts and representations concerning the open video system it intends to operate and has certified that it "agrees to comply and remain in compliance with each of the Commission's regulations" under Section 653(b) of the Communications Act. We note that if any representation in the Optical certification filing proves to be materially false or materially inaccurate, the Commission retains the authority to revoke Optical's certification or impose such other penalties it deems appropriate, including forfeiture.

¹⁵ *Id.* at 2.

¹⁶ See *RCN Telecom Services of California, Inc. d/b/a RCN of California*, 13 FCC Rcd 12009 (1998).

¹⁷ *Id.*

¹⁸ *Open Video Systems*, Order on Remand, 14 FCC Rcd 19700, 19704 (1999).

¹⁹ *Id.*

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, that the application of Optical Telecommunications, Inc. for certification to operate an open video system in the Service Area²⁰ **IS GRANTED**.

9. This action is taken by the Deputy Chief, Policy Division, Media Bureau, pursuant to the authority delegated by Section 0.283 of the Commission's Rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

²⁰ See *supra* n. 2, listing the communities contained within the Service Area.

²¹ 47 C.F.R. § 0.283.